APPEAL NO. 971839

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on August 13, 1997, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the CCH were whether the compensable injury is a producing cause of the appellant's (claimant) current back condition and whether the claimant sustained additional disability resulting from the compensable injury of (date of injury). The hearing officer found that the claimant's compensable injury was not a producing cause of the claimant's back problems, which resulted from bending over to pick up a piece of firewood on (disability date). The hearing officer found that the claimant was not unable to obtain or retain employment at his preinjury wages as a result of the compensable injury of (date of injury), on or after (disability date). The claimant appeals these determinations, arguing that the evidence clearly showed that his compensable injury was a producing cause of his current condition and that all the evidence showed he had disability since (disability date). The respondent (carrier) replies that the hearing officer's decision is supported by the evidence.

DECISION

We reverse the decision and order of the hearing officer and remand the case for development of evidence and reconsideration following the necessary further testing as stated by the required medical examination doctor selected by the Texas Workers' Compensation Commission (Commission).

It was not disputed that the claimant suffered a compensable injury on (date of injury); nor does either party appeal the hearing officer's finding to that effect which has become final pursuant Section 410.169. The claimant testified that he was initially treated by (Dr. K) for this injury. The claimant testified that at some point he moved to Houston and began treatment with (Dr. F). The carrier's attorney represented at the CCH that Dr. F was initially a carrier-selected doctor, but it is undisputed that Dr. F became the claimant's treating doctor. In a June 13, 1996, report Dr. F stated that the claimant had a "significant herniated nucleus pulposes [sic] at L5-S1" and recommended a laminectomy and fusion. Correspondence from the Commission which was in evidence stated that the carrier waived its right to a second opinion regarding spinal surgery. The claimant testified that he underwent spinal surgery performed by Dr. F. In a September 23, 1996, letter to the carrier Dr. F stated that he was releasing the claimant to regular duty. In an October 28, 1996, letter to the carrier Dr. F stated, in part, as follows:

> In my opinion the patient is approaching maximum medical improvement [MMI]. In my opinion, he can work to tolerance within appropriate limits. By necessity, he should avoid the extremes of heavy bending, lifting, stooping, climbing, or crawling.

The claimant testified that on (disability date), he bent over to pick up a piece of firewood in his driveway and felt back pain. He testified that he saw Dr. F that same day. In a (disability date), letter to the carrier, Dr. F stated, in part, as follows:

In my opinion, the patient has an acute low back strain and sprain superimposed on his postlaminectomy state. I am taking him off work. I am recommending physical therapy, rest, and reevaluation by me in one week. I do not find a focal surgical lesion at this time in contradistinction to the prior problem addressed surgically with apparent success.

In a January 16, 1997, letter to the carrier Dr. F stated, in part, as follows:

The patient was seen in the office by me today. He continues to have pain off and on. He has some rather significant pain behavior. Objectively, he has no discernible, focal radiculopathy. I find no clinical dysfunction as existed prior to surgery.

I am returning him to light duty on 01-20-97. I will reassess him in two weeks or on an as needed basis. Objectively, the prognosis is good. I find no indication for any further significant testing or treating.

The carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) dated January 29, 1997, on February 4, 1997, in which it stated, in part, as follows:

Carrier respectfully disputes payment of any and all med treatment & or Indemnity benefits after 12/9/96 due to intervening injury.

In a letter to the carrier dated February 19, 1997, Dr. F stated, in part, as follows:

In response to your letter of 02-03-97, I submit:

[Claimant's] appointment scheduled for 01-30-97 was cancelled due to your non-authorization. Apparently, a dispute has been filed regarding this claim.

[Claimant] called the office on 01-17-97 and stated that "I bent over to pick up the soap . . . my back went out again . . . I do not think light duty is a good idea . . . I will contact my adjuster and see about getting a second opinion. . . ."

I have no personal knowledge as to whether this situation is a continuation, new injury, aggravation, exacerbation, or functional overlay.

On April 3, 1997, the Commission entered an order appointing (Dr. S) as a Commission-selected medical examination order doctor to determine whether the claimant suffered a new injury on (disability date), or is suffering from a continuation of the (date of injury), injury. Dr. F issued a Report of Medical Evaluation (TWCC-69) dated April 11, 1997,

in which he certified that the claimant had not reached MMI. Dr. S stated as follows in a report of April 22, 1997:

> This gentleman is seen today to determine if the recurrence of pain on 12/09/96 should be considered a continuation of his Workman's Compensation injury of 4/23/96 or if indeed this should be considered a new injury. It is my medical opinion that the recurrence should be considered a continuation of the patient's injury of 4/23/96. The patient had no significant inciting incident which caused this. It is well known that not all patients get back to normal following laminectomy, and some have significant problems, and in 10% or so, repeat surgery may be indicated. [Claimant's] condition was never declared permanent and stable. He has never gotten back to full duty status and had recurrence of his pain with minimal bending episodes, and his pain has persisted.
>
> As mentioned above, it is my impression that this is a part of his initial injury. It is also my opinion that the evaluation of his recurrent pain is incomplete. In my opinion, he needs the following: 1) lumbar spine films to assess lumbar spine for evidence of disc collapse following surgery; 2) flexion/extension films to look for abnormal segmental motion; and 3) repeat MRI with gadolinium to evaluate the patient for recurrent disc herniation.

The claimant testified that he moved back to Austin and a Benefit Review Conference was held on his case on July 2, 1997. An interlocutory order dated July 2, 1997, was entered by the Benefit Review Officer ordering the carrier to pay income and medical benefits. In regard to medical benefits the order stated "at the direction of new treating doctor to be selected locally & approved automatically . . . as clmt has moved from Houston to the Austin area." The claimant testified at the CCH that he had seen (Dr. W) once prior to the CCH and had another appointment with Dr. W a few days after the CCH.

The hearing officer's findings of facts and conclusions of law include the following:

**FINDINGS OF FACT**

7.The compensable injury of (date of injury), was not a producing cause of the Claimant's current back problems resulting from bending over to pick up a piece of firewood on (disability date).

8.The Claimant sustained a sprain/strain to his back on (disability date).

9.The sprain/strain the Claimant sustained on (disability date), was not work related.

10.The Claimant was not unable to obtain or retain employment at pre-injury wages as a result of the compensable injury of (date of injury), on or after (disability date).

**CONCLUSIONS OF LAW**

3.The compensable injury of (date of injury), is not a producing cause of the Claimant's current back problems.

4.The Claimant did not sustain additional disability resulting from the compensable injury of (date of injury).

There is no statutory definition of "producing cause" nor is there any uniformly accepted language that, exclusive of all other means of expression, defines the term. Traders & General Insurance Co. v. Rooth, 268 S.W.2d 539, 542 (Tex. Civ. App.-Waco 1954, writ ref'd n.r.e.), and cases cited therein. Generally, producing cause has been thought of as a "but for" or "without which" cause. *See* 2 STATE BAR OF TEXAS, PATTERN JURY CHARGES PJC 20.01 (1989). In other words producing cause is generally accepted to mean a cause "without which" another event would not have occurred or cause which "but for" its existence another event would not have occurred. It is well settled that there may be more than one producing cause of an event. *See* Texas Workers' Compensation Commission Appeal No. 970897, decided June 30, 1997 (unpublished), and Texas Workers' Compensation Commission Appeal No. 94217, decided March 31, 1994. The question before the hearing officer here was whether the claimant's current back condition was causally related to his compensable injury, *i.e.*, would it have occurred without the compensable injury. The evidence presented concerning this issue came in the form of documents from Dr. F and Dr. S. Dr. F stated clearly in his letter of February 19, 1997, that he was not expressing an opinion regarding this issue. Dr. F, in fact, in his letter, states that he has not been able to see the claimant because of the carrier's refusal to authorize treatment after disputing the claim. Dr. S, on the other hand, links the claimant's back condition to his compensable injury. Dr. S also suggests further testing to determine the nature of the claimant's current condition. Whatever the pitfalls of a hearing officer making a finding on current condition as cutting off lifetime open medical,[1] no intelligent resolution can be made on the relation between a claimant's injury and current condition without knowing what the claimant's current condition is.

Here, Dr. F was cut off from further investigation by the carrier's dispute before he could form an opinion. Dr. S, while expressing an opinion, stated further testing needed to be done to determine what the claimant's current condition is. We remand this case for the hearing officer to obtain the testing Dr. S said was needed, and Dr. S's opinion in light of the

[1]*See* Judge Rhodes' concurring opinion in Texas Workers' Compensation Commission Appeal No. 971725, decided October 17, 1997.

results of that testing. Under the circumstances of this case, where the carrier stopped medical treatment shortly after the alleged intervening injury, and the Commission appointed Dr. S to render an opinion as to the effect of the alleged intervening injury, failure to perform the necessary testing recommended by Dr. S defeats the very purpose of his appointment.

The hearing officer's finding that the claimant did not have disability is clearly predicated on his finding that the claimant's compensable injury was not a producing cause of his back condition after (disability date). We reverse the hearing officer's finding as to disability based upon reversal of his finding on producing cause. We do note that the disability issue could have been more clearly worded, specifying a time period rather than using the term "additional disability." Based upon the record before us, we interpret the time period covered by the issue to be from (disability date), through the date of the CCH.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge